1995

State of Utah v. Brent Jackson, Raquel Nielsen and Patricia E. Smith : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH, Plaintiff and Appellee, vs. BRENT JACKSON, RAQUEL NIELSEN AND PATRICIA E. SMITH, Defendants and Appellants.	:	Case No. 950696-CA (consolidated cases) Category No. 2

AMENDED BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM A FINAL JUDGMENT OF GUILTY IN THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE LYNN W. DAVIS, DISTRICT COURT JUDGE

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AMENDED BRIEF OF DEFENDANTS-APPELLANTS[1]

JURISDICTION OF THE COURT OF APPEALS

Jurisdictional authority is conferred upon the Utah Court of Appeals pursuant to §78-2a-3(2)(f), Utah Code Annotated (1953, as amended).

STATEMENT OF THE ISSUES

I. Is the affidavit submitted in support of the search warrant lacking a substantial basis for issuance of a warrant, and therefore, fatally flawed?

II. Does the Utah Constitution protect Utah citizens' reasonable expectation of privacy in residential trash placed in a city-provided container and left at the edge of the city street for pickup?

[1]Pursuant to stipulation of Frederic J. Voros, Jr. Assistant Utah Attorney General, this amended brief replaces the original brief of appellants, filed with this Court on the 31st day of July, 1996.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ETC.

United States Constitution, Fourth Amendment.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of Utah, Article I, Section 14.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This appeal is from the trial court's final Judgment of conviction entered on the 10th day of October, 1995. Defendants further appeal from the trial court's denial of their Motion to Suppress Evidence, which denial was included in the trial court's Ruling On Defendants' Motion To Suppress entered on the 23rd day of March, 1995. Defendants' Notice of Appeal was filed in the trial court on the 18th day of October, 1995.

In the early morning hours of the 8th day of June of 1994, Sergeant Jerry Harper, of the Provo City Police Department searched two trash receptacles placed in the street for collection in front of the Defendants' home. According to the affidavit in support of the requested warrant, the officer identified no reason for the search of the trash cans. He did, however, mention two previous

incidents involving the residents: 1) approximately 36 days prior to the search of the trash receptacles, one of the residents had pleaded guilty to possession of marijuana and paraphernalia [the underlying offense giving rise to such guilty plea was committed on 15 January, 1993 - 509 days prior to presentment of the affidavit to the magistrate] and 2) approximately 56 days prior to the search of the receptacles, the residents were victims of an aggravated burglary and aggravated robbery in which several men forced their way into Defendants' home and held them captive while demanding money and drugs.

Based on the results of the search conducted by Sergeant Harper an affidavit was prepared and submitted to a magistrate. The magistrate issued a search warrant also on the 8th day of June shortly before noon. It authorized a day time search and a "no-knock" entry. The warrant was executed shortly before 5:00 p.m. on the 8th of June, 1994. Various items of controlled substances and paraphernalia were discovered in the home and seized. Each of the three defendants was charged with possession of controlled substances and paraphernalia. Defendants filed their written Motion to Suppress Evidence seeking a ruling from the trial court that the subject search warrant was improperly issued. Oral argument on such motion was heard on February 7, 1995. The trial court issued its ruling denying the motion on the 23rd day of March, 1995. Defendants subsequently entered conditional pleas of guilty on the 14th day of August, 1995, to an Amended Information

alleging two counts, to wit: possession of marijuana in a drug free zone, a class A misdemeanor, and possession of drug paraphernalia in a drug free zone, also a class A misdemeanor.

SUMMARY OF THE ARGUMENT

There did not exist a substantial basis for the magistrate to have issued the search warrant under an analysis based on the Fourth Amendment to the Constitution of the United States or under an analysis based on Article I, Section 14 of the Utah Constitution. The evidence of certain statements of the Defendants which were included in the affidavit filed in support of the search warrant were improperly included in the affidavit and should have been redacted from the affidavit and not considered by the trial court in reviewing the validity of the search warrant.

The Constitution of Utah recognizes as reasonable Defendants' expectation of privacy in the contents of their residential garbage containers left at curbside for collection by the municipal garbage department. The evidence obtained by the police officers pursuant to a warrantless search of Defendants' residential garbage containers, prior to the issuance of the subject search warrant, should have been ruled illegally obtained; that evidence obtained from the warrantless garbage container search should therefore have been redacted from the affidavit and not considered by the trial court in reviewing the validity of the search warrant.

ARGUMENT

POINT I

The affidavit submitted in support of the search warrant lacked a substantial basis for issuance of a warrant, and is therefore, fatally flawed

A. Standard of Review

The United States Supreme Court has adopted a "totality of the circumstances" test to determine if a magistrate properly found probable cause to issue a search warrant.[2] In so holding the Court directed that "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'"[3] "'A grudging or negative attitude by reviewing courts toward warrants,' is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hyper technical, rather than a common sense, manner.'"[4]

While the United States Supreme Court has required that an affidavit provide only a "substantial basis for ... concluding that a search warrant would uncover evidence of wrongdoing", and that "[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a

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[2] Illinois v. Gates, 462 U.S. 213 (1983).

[3] Gates, above, citing Spinelli v. United States, 393 U.S. 410 (1969).

[4] Gates, above, citing United States v. Ventresca, 380 U.S. 102 (1965).

fair probability that contraband or evidence of a crime will be found in a particular place[,]" the Court also stressed that "[i]n order to ensure that ... an abdication of a magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." [5]

The Fourth Amendment exclusionary rule was made applicable to the states through the Fourteenth Amendment.[6] The Utah Supreme Court has recognized this review-of-warrants test articulated by the United States Supreme Court.[7]

B. Insubstantial basis for issuance of the warrant

For the following reasons, the affidavit in this case did not provide the magistrate with a substantial basis to conclude that contraband or evidence of a crime would be found in the residence located at 1033 West 770 South, Provo, Utah.

1) Irrelevant paragraphs

The Utah Court of Appeals has held that information that does not aid the magistrate in his probable cause determination is irrelevant in a review of whether the warrant was properly issued.[8] Paragraphs 1., 2., 3., 4., 9., 10., 11., and 12. do not provide for

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[5] Gates, above.

[6] Mapp v. Ohio, 367 U.S. 643 (1961).

[7] State v. Anderton, 668 P.2d 1258 (Utah 1983); State v. Anderson, 701 P.2d 1099 (Utah 1985); State v. Babbell, 770 P.2d 987 (1989); State v. Thurman, 846 P.2d 1256.

[8] State v Potter, 860 P.2d 952 (Ut. App., 1993).

a probable cause determination and are, therefore, irrelevant to any review of whether the warrant was properly issued.

Paragraph 1. sets out the affiant's police training and experience. Nothing in this paragraph directly helped the magistrate determine if contraband would probably be in the subject residence. Defendants concede that, indirectly, the officer's experience in the recognition of marijuana stems and seeds would have aided the magistrate's determination of the nature of substances found in their residential garbage container. Defendants will argue below, however, that the mere existence of such substances in their residential garbage container, on the street, did not establish a fair probability that the same substances would be found in their residence.

Paragraphs 2. and 3. give no clue as to why one should conclude that drugs would probably be in this residence.

Paragraphs 4. details Provo City's system of residential garbage service. As with paragraph 1., it does not directly provide probable cause for the existence of contraband in the house. And, as with paragraph 1., this paragraph may have provided the magistrate with some insight into the connection of a garbage container to the subject residence, but again, Defendants will argue below that existence of illegal substances in the garbage containers did not provide probable cause to believe such substances would still be in the residence.

Paragraphs 9.and 10. are generic or canned statements of the affiant's experience with other drug users and provided the magistrate with no information that evidence of illegal activity would probably be found in the subject residence. Paragraph 11. simply describes the exterior of the residence. Paragraph 12. recites the affiant's subjective expectations. Neither of these two paragraphs would have aided the magistrate in his probable cause determination.

Paragraphs 1., 2., 3., 4., 9., 10., 11., and 12. cannot be construed to establish probable cause that evidence of criminal activity would be found in Defendants' house. If this warrant is to stand, it must be on the strength of the totality of paragraphs 5., 6., 7., and 8.

2) Staleness

Facts set out in an affidavit which are stale are likewise irrelevant to the magistrate's probable cause determination. Facts are stale "when a significant lapse of time occurs between the discovery of the information suggesting that evidence of the crime can be found at a particular locale and the magistrate's finding of probable cause or the execution of the warrant. The concern is whether so much time has passed that there is no longer probable cause to believe that the evidence is still at the targeted locale."[9] Paragraphs 2., 3., 4., 5., 6., 7., and 8. of the

[9] State v Hansen, 732 P.2d 127 (Utah 1987); State v. Thurman, 846 P.2d 1256 (Utah 1993).

affidavit provided the magistrate with stale facts that could not support the warrant.

a) Staleness of "evidence" within the garbage container

Paragraphs 4., 5., 6., 7., and 8. of the affidavit establish that the affiant searched through the contents of two garbage containers, each marked "1033" corresponding with the street address of the subject house and each situated on the street in front of the subject residence. Paragraph 4. recites that the residential garbage containers in Provo are set on the street once a week for pick up by a city truck. Paragraphs 6., 7., and 8. detail how the affiant found small ("user") amounts of marijuana and paraphernalia in the can and that the containers also had trash directly associated with Pat Smith and Brent Jackson.

With this information and assuming that the two cans were routinely placed on the street for collection each week, the magistrate could conclude - at best - only that the marijuana and paraphernalia found in them were discarded no more than 1 week prior. But since the affidavit contained no information that the affiant had watched the two containers to determine when they had last been emptied by Provo City trucks, the assumption that the trash within them had been discarded from the residence within the week immediately prior cannot be fairly made. It is equally rational to conclude that this residence's garbage was not taken to the street on a weekly basis, either because of habit, neglect, an

intervening vacation, or several other logical reasons. Without information as to the most recent time the containers had been collected, the magistrate had no basis to determine the "age" of the garbage, he could only guess as to how long the trash had been in them, and by extension how recently contraband may have been in the residence. On its face, the affidavit does not establish whether contraband would have been in the residence 1 week prior, 2 weeks prior, 8 weeks prior, 6 months prior, etc. The information in these paragraphs is stale and cannot be a basis for the issuance of a warrant.

b) Staleness of evidence of prior bad acts

Similarly, paragraphs 2. and 3. contain stale information having no application to the magistrate's probable cause determination. Besides providing no facts from which to conclude contraband was probably in the residence, the information in these two paragraphs concerns occurrences that were 56 and 509 days old respectively. Utah appellate courts have found such remote facts to be totally useless in the probable cause determination.[10] This reviewing court should likewise rule that the information from these two paragraphs provided the magistrate with no probable cause for the issuance of the warrant.

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[10] State v. Brooks, 849 P.2d 640 (Ut. App., 1993); State v. Vigh, 871 P.2d 1030 (Ut. App., 1994).

3) Use of improper information

Paragraph 2. of the supporting affidavit told the magistrate that armed intruders had entered the subject residence and that "[a]ccording to Smith and Jackson the men held them captive for several hours demanding drugs and money. The men wanted to know where the drugs were."

On 17 May, 1994, 3 weeks prior to the date of the sworn affidavit, each of these Defendants was granted immunity by the Utah County Attorney for "any crime disclosed by [their] testimony arising out of incidents which occurred on April 13, 1994, ..."

The United States Supreme Court has held that if false information has been knowingly and intentionally or recklessly included in an affidavit sought to support a search warrant, such information must be redacted from the affidavit. If the affidavit then lacks probable cause, the evidence seized pursuant to the warrant must be suppressed as if the improper information had not been originally included in the affidavit.[11] The Utah Supreme Court has recognized such a procedure.[12] The Utah Supreme Court has further extended this reasoning to include misstatements which occur because information is omitted.[13]

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[11] Franks v. Delaware, 438 U.S. 154 (1978).

[12] State v. Slowe, 728 P.2d 110 (Utah 1986).

[13] State v. Nielsen, 727 P.2d 188 (Utah 1986).

In providing the information in paragraph 2., the affiant failed to advise the magistrate that each Defendant had been granted immunity in consideration for their testimony involving the 13 April incident. Also omitted from the affidavit was information that further evidence adduced at the preliminary hearing for the aggravated burglary and aggravated robbery indicated that the intruders may have been looking for a man named "Fransisco" who may have resided in and moved from the same residence before these Defendants moved into it.

In addition to being stale and of only marginal help to the magistrate in his probable cause determination, paragraph 2. recklessly omitted information from the magistrate which would have established that the statements within the paragraph were privileged and of even more dubious value than might be facially apparent. Accordingly, this paragraph should have been excluded from the affidavit and the warrant should be assessed as if the affidavit did not originally include this information.

4) Evidence found in the garbage did not indicate that the same substances were probably inside the residence

In addition to being stale, the evidence of marijuana and paraphernalia in the two garbage containers was of only marginal value in a determination of whether similar items were probably in the residence.

As stated in paragraph 8., the evidence indicated "possession of small amounts for use." It was not indicated that inventories

for distribution were present or expected. The "stems, seeds," and "small piece of marijuana," as well as the generally minute quantities of evidence found in the containers was indicative of the "dregs" or remnants of a small personal-use amount that had already been consumed. The nature of the evidence was also consistent with a small amount that may have, on an isolated occasion, been brought into the house, used, and the remnants discarded by a guest. Additionally, because the affiant did not indicate when the containers were taken to the street, nor that the containers were kept under surveillance once on the street until searched, and because once on the street the containers were accessible to third parties, the contraband could have been placed in them by strangers or neighbors.

Defendants do not argue that the magistrate's determination of probable cause must necessarily exclude all other possibilities. But, the affidavit must establish a "fair probability" that evidence will be found where it is sought. The conclusion that contraband was probably still in the house was not supported by corroborating evidence. From the affidavit it was at least as likely that contraband in the cans originated with a house guest, a stranger, or a neighbor. Defendants argue that where, as here, the evidence points equally to several possibilities, a finding of probable cause that one of many possibilities is most likely, is not justified without corroborating evidence.

5) Isolated nature of evidence

> Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. United States v. Johnson, 461 F.2d 285 (10th Cir., 1972).[14]

The affidavit recites the one-time presence of a small amount of contraband indicative of personal use. The affidavit did not indicate contraband had been found in the same garbage containers on other dates. No evidence was provided to the magistrate that contraband probably was in the residence on other occasions. Taken in its best light, the affidavit merely recited the presence of a small amount of contraband in the residence's garbage on one isolated date. The affidavit did not indicate a protracted pattern of usage sufficient to postulate that similar substances might routinely be in the home. Neither did the affidavit establish a course of conduct consistent with repeated drug use or possession in the home. The isolated presence of a small amount of contraband that may have been discarded 1 week, 2 weeks, or more, prior to discovery by the police has a dwindling probable cause value as an indicator that contraband may still be in the home.

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[14] State v. Hansen, 732 P.2d 127 (Utah 1987); State v. Stromberg, 783 P.2d 54 (Ut. App., 1989); State v. Brown, 798 P.2d 284 (Ut. App., 1990); State v. Singleton, 854 P.2d 1017 (Ut. App., 1993).

6) Failure to preserve evidence

Paragraph 6. of the affidavit recites that marijuana and paraphernalia were found in Defendants' garbage. It was further indicated in that paragraph that the marijuana field tested positive for marijuana. However, the record of this case does not indicate that the contraband was preserved or made an exhibit to the affidavit. Consequently, it is impossible for this court to adequately review the assertion that contraband was found in the two garbage containers. Where, as in this case, a warrant is based substantially on the seizure of real evidence, such evidence should be preserved for the record, first for examination by the issuing magistrate and ultimately for review by the trial or appellate court. The failure to preserve the evidence disadvantages the Defendants and should be a factor considered by this court in assessing the adequacy of the facts supporting the warrant.

C. Good Faith exception

The United States Supreme Court has held that evidence obtained by police officers acting in good faith, objectively and reasonable relying on a search warrant issued by a neutral and objective and detached magistrate, should not be excluded even if the warrant is found to be legally insufficient by reason of lack of probable cause.[15]The Leon Court also noted four exceptions where good faith will not save an invalid warrant: 1) the warrant

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[15]United States v. Leon, 468 U.S. 897 (1984).

was issued by a magistrate who was misled by false information, 2) the magistrate abandons his neutral and detached objectivity, 3) the affidavit is so lacking in probable cause that it is unreasonable for the officer to rely on it, 4) the warrant is so facially deficient in describing the place to be searched or the thing to be seized that the officer cannot legally rely on it.[16]

If this court should determine that the affidavit lacked sufficient probable cause to support the issuance of the search warrant, it should further rule that because the affiant also served the warrant, he could not ignore the requirement to present the magistrate with probable cause for the warrant and then claim that the failure to do so constitutes good faith.[17]

POINT II

The Utah Constitution protects Utah citizens' reasonable expectation of privacy in residential trash placed in a city provided container and left at the edge of the city street for pickup

A. Standard of Review

Defendants have found no Utah case which specifically holds that the standard of review of warrants under Article I, Section 14 of the Utah Constitution is significantly different than the United States Supreme Court's standard under the Fourth Amendment to the United States Constitution. The Utah Court of Appeals has stated

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[16]Leon, above.

[17]Leon, above; State v. Droneburg, 781 P.2d 1303 (Ut. App., 1989); State v. Rowe, 806 P.2d 730 (Ut. App., 1991).

that it considers that the Utah Supreme Court has had ample opportunity to pronounce a different standard and that because it has not, the prevailing federal standard of review also applies to any review of the Utah Constitution guarantees against unreasonable searches and seizures.[18] Defendants therefore analyze the issuance of the warrant in this case, under the Utah Constitution, by applying the standards set forth in Gates, above.

The Utah Supreme Court recognizes that an exclusionary rule is proper to insure the guarantees of Article I, Section 14 of the Utah Constitution.[19] Therefore, exclusion of all evidence seized pursuant to the warrant is proper if the warrant is deemed issued in violation of Article I, Section 14 of the Constitution of Utah.

B. The Utah Constitution recognizes Defendants' reasonable expectation of privacy in their residential garbage

Defendants' argument, above, that the Fourth Amendment to the United States Constitution does not support the issuance of the warrant in this case acknowledges that the United States Supreme Court has held that the Fourth Amendment allows a warrantless search of a citizen's garbage left curbside and outside of the residential curtilage, for the reason that the United States Supreme Court does not recognize an expectation of privacy in

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[18] Salt Lake City v. Trujillo, 854 P.2d 603 (Ut. App., 1993); State v. Singleton, 854 P.2d 1017 (Ut. App., 1993).

[19] State v. Larocco, 794 P.2d 460 (Utah 1990); State v Thompson, 810 P.2d 415 (1991).

garbage so situated.[20]In contrast, Defendants here argue that Article I, Section 14 of the Constitution of Utah does recognize an expectation of privacy in residential garbage, even when placed outside the curtilage for collection by the municipal authority.

In Katz v. United States, 389 U.S. 347 (1967) the United States Supreme Court developed the two-part test to determine if one has a reasonable expectation of privacy in a place searched. First, defendant must assert a subjective expectation of privacy in the searched area. Second, society must accept such expectation of privacy as reasonable. Likewise, the Utah Supreme Court has held that an expectation of privacy is the threshold criterion for determining if Article I, Section 14 applies.[21] Defendants argue that, unlike the Fourth Amendment, Article I, Section 14 of the Utah Constitution can be reasonably interpreted to reflect that Utah society would recognize and accept their expectation of privacy in their residential garbage left at curbside.

1) The Utah Constitution can recognize freedoms not guaranteed by the United States Constitution

A state court may interpret its own constitution in a manner different from the United States Supreme Court's interpretation of a similar federal provision,[22] so long as it does not reach a

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[20]California v. Greenwood, 486 U.S. 35 (1988).

[21]State v. Thompson, 810 P.2d 415 (Utah 1991).

[22]Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Herb v. Pitcairn, 324 U.S. 117 (1945); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965).

result providing its citizens with less rights than those guaranteed by the Constitution of the United States.[23]

The Utah Supreme Court has stated that "it is imperative that Utah lawyers brief this Court on relevant state constitutional questions."[24] On several occasions Utah's highest court has shown a willingness to make substantive law based solely on the Utah Constitution. See, e.g. American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985) (scope of privilege against self-incrimination); Malan v. Lewis, 693 P.2d 661 (Utah 1984) (automobile guest statute); State v. Ball, 685 P.2d 515 (Utah 1984) (questioning a juror about drinking alcohol); Gray v. Employment Security, 681 P.2d 807 (Utah 1984)(Durham, J. concurring and dissenting, due process in re: unemployment benefits); State v. Larocco, 794 P.2d 460 (Utah 1990) (automobile exception to search warrant); State v. Thompson, 810 P.2d 415 (Utah 1991) (expectation of privacy in bank records); Zissi v. State Tax Commission of Utah, 842 P.2d 848 (Utah 1992) (Utah Constitutional exclusionary rule prevents admission of illegally seized evidence at Commission hearing). On other occasions the Court has suggested it is inviting argument on Utah Constitution Article I, Section 14, specifically.[25]

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[23]Malan v. Lewis, 693 P.2d 661 (Utah 1984).

[24]State v. Hygh, 711 P.2d 264 (Utah 1985); State v. Earl, 716 P.2d 803 (Utah 1986).

[25]State v. Hygh, 711 P.2d 264 (Utah 1985); State v. Earl, 716 P.2d 803 (Utah 1986); State v. Watts, 750 P.2d 1219 (Utah 1988); Durham, Employing the Utah Constitution, 2 Utah Bar Journal 25 (Nov., 1989).

From the above it is clear that Utah's appellate courts have the authority to interpret Utah's constitutional search and seizure provisions differently than the corresponding federal provision. The Utah Supreme Court has invited discussions of Utah Constitutional principals, has established a history of reaching them, and, has developed Utah Constitutional law in variance with federal law. In this context, it is proper for this court to consider an interpretation of the Utah Constitution which may be different from the federal constitutional holding. Oregon Justice Hans Linde has stated: "A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."[26] It would be equally shortsighted for this court not to entertain such a state-based argument.

2) The Utah Constitution can reasonably be interpreted to recognize an expectation of privacy in one's residential garbage left at curbside, outside of the curtilage

Defendants argue that the Utah Constitution recognizes an expectation of privacy in one's residential garbage left at curbside for collection by a municipal authority, notwithstanding that the Fourth Amendment to the United States Constitution does not. The argument is founded on a) the societal and historical context of the Utah Constitution, b) the "primacy model", and c) analogous holdings and reasoning.

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[26] Welsh & Collins, Taking State Constitutions Seriously, 14 The Center Mag. 6, 12 (Sept./Oct. 1981).

a) Societal and constitutional historical context[27]

It is generally not disputed that Utah's history is unique. The original (non-native) settlers were literally driven out of settlements in three other states (primarily for their religious practices and because of jealousy of their economic successes and mistrust of their tight-knit ecclesiastically oriented society) while governments in the other states at best turned a blind eye to their banishment and at worst acted with complicity. The settlers came to the west in an attempt to isolate themselves from persecution and to create an autonomous society. Their migration to the great basin was one of the largest mass migrations in the history of America.[28] The initial government of the immigrants was comprised of the leaders of their religion (The Church of Jesus Christ of Latter Day Saints [Mormons]) until the first of seven attempts at a constitution was drafted in 1849 (The Constitution of the State of Deseret).[29]

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[27]In this portion of this memorandum and in the next succeeding sub-section Defendants have borrowed extensively from Kenneth L. Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14, as well as briefing from previous appellate arguments provided by Ronald J. Yengich and Hakeem Ishola. Use of information from these works has been previously approved by Messrs. Wallentine, Yengich, and Ishola. The assistance and collegiality of these three gentlemen is acknowledged and greatly appreciated.

Also Society of Separationists v. Whitehead, 870 P.2d 916 (Utah 1993), provides a similar analysis of Utah's unique history. In this case the Utah Supreme Court held that because of Utah's unique history a ruling can follow a different line of analysis than has been used in the federal context.

[28]John J. Flynn, Federalism and Viable State Government - The History of Utah's Constitution, 1966 Utah Law Review 311.

[29]Flynn, at 315; see also, Peter Crawley, The constitution of the State of Deseret, 29 BYU Studies 7 (1989).

"[The] Constitution of the State of Deseret was as much a public relations piece as an application for statehood, a document designed to show that the traditional political processes were alive and well in Deseret. ... Although the federal constitution was the ultimate prototype, there is little doubt that [it] was derived from the Iowa Constitution of 1846."[30] "In many respects the constitution of 1849 was similar to the Illinois Constitution of 1818, the constitution the Mormons had lived under in Nauvoo, Illinois."[31] From this first attempt at a written constitution followed six more attempts in 1856, 1862, 1872 (which used the Nevada Constitution of 1864 as a model), 1882, 1887, and 1895 (which borrowed heavily from earlier attempts at a Utah constitution as well as from the Constitutions of Nevada, Washington, Illinois, and New York). This final draft was approved by voters on 5 November, 1895. President Grover Cleveland proclaimed Utah a state on 4 January, 1896.[32]

Heavily influencing the effort at arriving at a constitution that would be acceptable both to the inhabitants of the area and the U.S. Congress was the Mormon church's official pronouncement embracing the practice of plural marriage (polygamy) in 1852.[33] All

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[30]Crawley, at 15.

[31]Flynn, at 315.

[32]Flynn, at 316-325.

[33]Linford, The Mormons and the Law: The Polygamy cases, 9 Utah Law Review 308 (1964).

drafting attempts after 1852 were undoubtedly affected by federal displeasure with such official practice.[34]

Official U.S. Congressional attempts to prosecute polygamy were the Morrill Act of 1862 and the Edmunds-Tucker Act of 1882.[35] These Acts were not directed at the riff-raff and disenfranchised. Rather, "[b]y indicting the [Mormon] Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy."[36] The federal plan ultimately worked - the Church's leadership was cornered into renouncing its endorsement of polygamy if any hope of statehood was to be realized. "By 1893, after the Church had renounced polygamy and prosecutions had largely ceased, there had been 1004 convictions for unlawful cohabitation and thirty-one for polygamy."[37] The 1887 Constitution contained a criminal law punishing polygamy[38] and the Constitution of 1895 included Article III, providing, inter alia, "polygamous or plural marriages are forever prohibited."[39] Statehood quickly followed in two months.

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[34]Flynn, at 316.

[35]Firmage, Religion & the Law: The Mormon Experience in the Nineteenth Century, 12 Cardozo Law Review 765, (1991).

[36]Firmage, at 772.

[37]Firmage, at 775; see also, L. Arrington, Great Basin Kingdom An Economic History of the Latter Day Saints 1830 - 1900, (1958).

[38]Flynn, at 320.

[39]Constitution of Utah, Article III, First: (1896).

Mormons, a close and self sufficient society, suffered from organized persecution that was not held in check (and quite probably was encouraged) by three separate state governments. They undertook an arduous mass migration over great distances to both avoid the persecution and maintain their monolithic religious-based society. Once they arrived here they were made the further target of almost fifty years of federal pressure because of Congress' disapproval of their belief in polygamy. Ultimately, before the citizens of Utah were allowed acceptance into the union, the church which formed the foundation of their society, was forced to take the degrading step of publicly denouncing what had been a basic religious tenet (polygamy).

In this setting, for the fifty years immediately preceding acceptance into the union, several attempts were made at drafting a state constitution that would placate Congress. The seventh draft, prohibiting polygamy, finally secured statehood. The development of the State's present constitution and the intent of its various provisions, cannot be assessed without an appreciation of these dynamics.

Article I, Section 14 (prohibition against unreasonable searches) was drafted by a people who thrice were not protected by their local governments from mob violence, who - at the risk of annihilation - fled to a place of total isolation from other societies and all governments, who endured ridicule and systematic federal prosecution of their membership as well as their leaders

for a core religious belief (the evidence for such prosecutions - plural wives and co-habitants - being harbored in their private homes), who maintained a public disagreement with the federal government for five decades, and who were forced to suffer public humiliation before acceptance by the federal government, would not have taken lightly the intrusion of those governments into their persons, houses, papers, and effects.

Article I, Section 14 is a reflection of the people's feelings of hostility and distrust of a government perceived as inimical to their beliefs if not their existence. While the people's leaders had the federal text as a model for this section, they were also personally targets of federal polygamy prosecutions.[40] Consequently, the drafters of the various attempts at a state constitution very likely personally experienced searches of their homes and effects in conjunction with Morrill and Edmunds investigations and prosecutions.[41] The totality of this societal

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[40]Firmage, at 771-778.

[41]See Bradley, Hide and Seek: Children of the Underground, 51 Utah Historical Quarterly 133 (1983) (recounting how a polygamist's home was searched 100 times in a four year period; See also "How They Do It," Deseret News Weekly, January 20, 1886 at 1 (explaining how federal marshals entered a polygamist's home without a warrant and by breaking the door with an axe; Ivans, A Constitution for Utah, 25 Utah Historical Quarterly 95, 100 (1957); White, The Making of the Convention President: The Political Education of John Henry Smith, 39 Utah Historical Quarterly 351,357 (1971) (detailing how John H. Smith, a Mormon apostle and President of the constitutional convention of 1895 practiced polygamy and had been the target of federal marshals' searches); Paneck, A peculiar People and Their Constitution: The Culture and Times of 19th Century Utah, 6, unpublished manuscript in the possession of Mr. Kenneth R. Wallentine (recording how several members of the subcommittee selected to draft the declaration of rights for the 1895 constitution had publicly protested the search and seizure practices of the federal marshals).

and constitutional history of Utah, therefore, strongly suggests a heightened appreciation and valuation of the privacy rights in personal effects - particularly one's home. Accordingly, Defendants argue that Article I, Section 14 should be interpreted to reflect that Utah society would recognize as reasonable, an expectation of privacy in one's residential garbage.

b) The "primacy" model

"Primacy" means "the state of being first (as in rank)."[42] The term "primacy model," in the context of state constitutional analysis has two branches. "State bills of rights are first in two senses: first in time and first in logic."[43]

The first branch of the primacy model recognizes that principals of state constitutions predate the federal constitution which was itself patterned after the state documents:

> By 1783, thirteen states, all but Rhode Island, had adopted written constitutions. The majority of them contained most of the catalogue of civil liberties included in Virginia's Declaration of Rights and Maryland's and Delaware's and Pennsylvania's. But they were by no means identical. That was no accident. During the months preceding independence, political leaders debated the case for having the Constitutional Congress prepare uniform constitutions for the states. They finally rejected this idea in favor of calling upon each state to write a constitution satisfactory to itself.[44]

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[42]The Merriam-Webster Dictionary, G. & C. Merriam Co. (1974).

[43]Justice Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 University of Baltimore Law Review 379 (1980).

[44]Linde, at 381; F. Green, Constitutional Development in the South Atlantic States, 1776-1860, at 52-56 (1930).

> Far from being the model for the state, the Federal Bill of Rights was added to the Constitution to meet demands for the same guarantees against the new central government that people had secured against their own local officials. Moreover, the states that adopted the new constitutions during the following decades took their bill of rights from the preexisting state constitutions rather from the federal amendments.
>
> ....
>
> The Federal Bill of Rights did not supersede those of the states. It was not interposed between the citizen and his state. ... Only the Civil War made it clear that it might sometimes be necessary to use federal law as a mode of doing that which a state could but did not do for itself - the protection of some of its citizens against those in control of its government.
>
> ....
>
> It is the fourteenth amendment that has bound the states to observe the guarantees of the Federal Bill of Rights.
>
> ....
>
> We tend to forget how recently the application of the Federal Bill of Rights to the states developed. Throughout the nineteenth century and the first quarter of the twentieth, state courts decided questions of constitutional rights under their own state constitutions. ... Of course, the states had all these guarantees in their own laws long before the Federal Bill of Rights was applied to the states. State courts had been administering these laws, sometime generously, more often not, for a century or more without awaiting an interpretation from the United States Supreme Court.[45]

The second branch of the primacy model posits that "[j]ust as rights under the state constitutions were first in time, they are first also in the logic of constitutional law."[46] "The primacy model treats the state constitution as the fundamental wellspring of individual rights. Federal decisions and their underlying

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[45]Linde, at 380-382; see, also generally Note, The Utah Supreme Court and the Utah Constitution, 1986 Utah Law Review 319.

[46]Linde, at 383.

analysis are regarded as persuasive, although not controlling, authority."[47] As the Connecticut Supreme Court stated:

> In [civil liberty] adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.[48]

Dicta in several Utah appellate court decisions hints that the primacy model may be appropriate for Utah jurisprudence. Justice Zimmerman has noted "[t]he federal law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Constitution....[s]ound argument may be made in favor of position at variance with the current federal law respecting both the scope of the individual's right to be free from unreasonable searches and seizures and the remedy for any violation of that right."[49] Defendants argue that the primacy model is an appropriate methodology for interpretation of the breadth and depth of the rights guaranteed by the Utah Constitution generally and by Article I, Section 14 specifically. Under this theory this Court is free to conclude that the Utah

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[47]Wallentine, at 9.

[48]State v Marsala, 579 A.2d 58 (Conn., 1990).

[49]State v. Hygh, 711 P.2d 264, 272-273 (Utah 1985); see also Malan v. Lewis, 693 P.2d 661 (Utah 1984); State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988); State v Larocco, 742 P.2d 89, 108 (Ut. App., 1987) (Billings, J., dissenting).

Constitution accepts as reasonable an expectation of privacy in one's residential garbage, irrespective of the United States Supreme Court's contrary position on the issue. This Court should so rule.

c) Analogous holdings and reasoning

As the United States Supreme Court held in Katz, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citation] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[Citations.]"[50] Five states have determined that their state constitutions recognize an expectation of privacy in residential garbage: People v. Krivda,[51] 486 P.2d 1262 (Cal., 1971), State v. Tanaka, 701 P.2d 1274 (Hawaii 1985), State v. Hempele, 576 A.2d 793 (N.J. 1990), State v. Boland, 800 P.2d 1112 (Wash. 1990), and Moran v. Indiana, 625 N.E.2d 1231 (Ind. 1993).

Seemingly, implementing the reasoning of Katz, and notwithstanding the existence of federal court holdings to the contrary, the Supreme Court of Hawaii, in Tanaka, reviewed three

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[50]Katz, above, at 351-352.

[51]In this case the California Supreme Court held that society is prepared to accept one's expectation of privacy in residential garbage set at the curb for collection by a municipal authority. While the Krivda decision does not clearly explain whether such holding is based on an interpretation of the United States Constitution or the California Constitution, the United States Supreme Court in Greenwood, above, determined that the Krivda holding was based on both constitutions. See Greenwood at 39.

warrantless residential garbage search challenges (one of which presented a factual setting substantially similar to the case before this Court) and concluded:

> The main issue is whether society is prepared to recognize defendants' expectation of privacy as reasonable....In our view, [the Hawaii Constitution's search and seizure provision] recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.
>
> ....
>
> [W]e believe defendants' expectations of privacy are ones society is prepared to recognize. People reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. Business records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their activities, associations, and beliefs. It is exactly the type of overbroad governmental intrusion that [the Hawaii Constitution's search and seizure provision] was intended to prevent.

Similarly, the Hempele court, noting that "[c]lues to people's most private affairs can be found in their garbage...." and "[a] plethora of personal information can be culled from garbage: a single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it[,]"[52] found it reasonable to expect privacy in one's residential garbage.

In Boland, the Washington Supreme Court held that "[w]hile a person must reasonably expect a licensed trash collector will

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[52]Hempele, above, at 802-803.

remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion."[53]

In Moran, the Indiana Supreme Court held that [w]arrantless searches are presumptively unreasonable, and the burden is placed on the state to show that the search falls within one of the recognized exceptions to the warrant requirement. The common thread underlying the recognized exceptions is the concept of 'exigent circumstances' which render the procurement of a warrant impractical or inadvisable because of a danger of harm to individuals or the potential destruction of evidence."[54]

This Court is urged to pay particular attention to the reasoning of Justice Brennan's dissent in the United States Supreme Court garbage search case (Greenwood), with whom Justice Marshall joined:

> Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior.
>
> ....
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> '[A]lmost every human activity ultimately manifests itself in waste products....'[Citations]
>
> ....
>
> 'If you want to know what is really going on in a community, look at its garbage' (quoting renowned archeologist, Emil Haury)
>
> ....
>
> It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"
>
> ....

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[53]Boland, above, at 1117.

[54]Moran, above, at 1239.

> Most of us, I believe, would be incensed to discover a meddler - whether a neighbor, a reporter, or a detective - scrutinizing our sealed trash containers to discover some detail of our personal lives.
>
> ....
>
> The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home;...'What a person ... seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[Citing to Katz]. (emphasis in the original).
>
> ....
>
> [T]he voluntary relinquishment of possession or control over an effect does not necessarily amount to a relinquishment of privacy expectation in it. Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository...[55]

Of additional significance to the Greenwood dissent was the fact that Greenwood was compelled by county ordinance to set his trash curbside for weekly pick-up by the municipal authority and prohibited from accumulating it on his property or disposing of it in any other fashion.[56] Similarly, in Defendants' situation, Provo City Revised Ordinances 7.03.080(4)(c) prohibits accumulation of garbage by any owner or occupier of real property "which is not securely protected from flies." Other provisions of the Provo City Revised Ordinances provide as follows:

PCRO 11.02.010. Mandatory Residential Service by Provo City

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[55]Greenwood, above, (Brennan and Marshall J.J., dissenting), at 1632-1637.

[56]Greenwood, above, (Brennan and Marshall, J.J. dissenting), at 1635-1637.

> Provo City shall provide mandatory residential collection service to all structures used for human habitation, which do not contain more than two dwelling units.[57]
>
> PCRO 11.02.030. Regulations Applicable to Provo City Residential Collection.
>
> (1) Residential solid waste shall be collected only from containers obtained from Provo City. (Containers obtained from Provo City are specially designed for use in an automated collection system.)
>
> ...
>
> (3) Except where the director shall otherwise agree, collections shall be made from the street. Containers shall be placed at the edge of the street in a manner that will allow a collection truck to be driven to the side of the container.
>
> ...

As in Greenwood, Defendants here were compelled to place their refuse at the curbside, outside of their curtilage, each week, for pick-up by Provo City garbage trucks. They were prohibited from accumulating trash on the premises. They were further prohibited from disposing of their trash other than by way of Provo City's "mandatory" residential trash collection service. Defendants did not abandon their trash in the sense that they placed it at the street for any and all passers-by to rummage through. Rather, the trash was placed on the street in reasonable reliance that it would be handled only by Provo City trash collectors, consistent with the above-noted ordinances. Defendants had no choice but to place the garbage on the street. It is contrary to constitutional concepts of citizens' security in their property to mandate them by ordinance to place it in an area where it will be subject to search by the

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[57]The residence in the case before this Court does not contain more than two dwelling units.

very government which compelled them to place it there in the first place.

The Utah Supreme Court has already decided a case which is substantially analogous to the case before this Court. In State v. Thompson, 810 P.2d 415, Defendants sought protection under Article I, Section 14 from the government's search of their bank records held by their banks. The banks and not the Defendants had been the subject of the searches. Defendants asserted a reasonable expectation of privacy in the bank records held by their banks, notwithstanding that the United States Supreme Court had previously held that no such expectation of privacy was recognized under the Fourth Amendment to the Constitution of the United States.[58] Noting that other state courts had rejected the Miller holding under their state constitutions, and further noting that such other state courts "found the rationale in Katz v United States, that 'the Fourth Amendment protects people, not places,' to be more persuasive than that of Miller[,]" the Court agreed with Defendants that Article I, Section 14 of the Utah Constitution recognized a right of privacy in Defendants to the bank records held by their banks.

Justice Zimmerman, concurring in the holding of Thompson, stated:

> [w]e are rejecting the argument advanced by the State that we should follow federal standing law and deny those

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[58]United States v Miller, 425 U.S. 435 (1976).

> not directly subjected to the search any right to challenge its legality. [Citations.]
> I find this entirely appropriate. Even where federal rights are at stake, standing law is state law, and we are not bound to follow federal precedent.[Citation.] In the area of search and seizure, the federal courts have developed extraordinarily restrictive doctrines that have the effect, if not the purpose, of placing a large percentage of illegal activities beyond the scrutiny of the courts. [Citations.] I see no reason for us to follow suit, especially when state constitutional rights, which we have a peculiar obligation to protect are at stake.

Because the court in Thompson found defendants had standing to challenge the search, it also necessarily found Defendants had a reasonable expectation of privacy in the records left with their banks.[59] Justice Zimmerman emphasized two important points in his concurring opinion: a) standing (and therefore a determination of a claim of a reasonable expectation of privacy) is a state law question, and b) restrictive federal doctrines that serve to insulate illegal searches from judicial scrutiny should not be adhered to by this State. Thompson therefore stands for the principal that determining the reasonableness of one's expectation of privacy (the issue raised in this case by these Defendants) is a state law issue and that the guidelines developed by federal decisions interpreting the Fourth Amendment should not necessarily be followed (primacy model).

Defendants argue that Thompson allows, if not directs, this Court to make an independent determination under Article I, Section 14 of the Utah Constitution, of whether Defendants have a

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[59]See Rakas v Illinois, 439 U.S. 128 (1978).

reasonable expectation of privacy in their residential garbage left at curbside. Defendant's argue that Thompson further suggests that Fourth Amendment principals and holdings in this regard are not controlling in such determination. Defendants lastly argue that the reasoning of the dissent in Greenwood as well as the holdings of Krivda, Tanaka, Hempele, Boland, and Moran should serve as guidance in the determination.

C. Good Faith exception viz a viz Article I, Section 14, Constitution of Utah

The Utah Supreme Court has held that an exclusionary rule does apply to violations of Article I, Section 14 of the Utah Constitution,[60] however, it does not appear that Utah Appellate courts have decided whether a good faith exception similar to the one set forth in United State v Leon is applicable to violations of Article I, Section 14. Defendants argue that no good faith exception should save improperly issued search warrants from the effect of the Utah Constitutional exclusionary rule. At least one Utah appellate Justice has opined that "a healthy skepticism should permeate the court's consideration [of a good faith exception to Article I, Section 14] in view of the troublesome analysis in Leon,[61] and the Supreme Court noted, without comment, that

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[60]Larocco, above; Thompson, above.

[61]State v Rowe, 806 P.2d 730, 743 (Ut. App. 1991).

Connecticut has found a good faith exception incompatible with its constitution.[62]

States that have rejected a good faith exception to their state constitutions are as follows. New York, People v. Bigelow, 488 N.E.2d 451 (N.Y., 1985) (exclusionary rule's purpose would be frustrated, a premium would be placed on illegal police action, would create incentive to others to act illegally); Michigan, People v Sundling, 395 N.W.2nd 308 (Mich. App. 1986) (exclusionary rule in its present form is necessary to preservation of right to be free from unreasonable government intrusion); New Jersey, State v Novembrino, 519 A.2d 820 (N.J., 1987) (would undermine police motivation to comply with constitutional requirement of probable cause, would diminish quality of evidence presented in search warrant applications); North Carolina, State v. Carter, 370 S.E.2d 553 (N.C., 1988) (judicial integrity demands suppression of illegally obtained evidence); Connecticut, State v Marsala, 579 A.2d 58 (Conn., 1990) (would discourage thorough police work, would discourage proper care taken by magistrates, would encourage reviewing courts to simply look for good faith instead of reviewing the probable cause requirement); Pennsylvania, Commonwealth v. Edmunds, 586 A.2d 887 (Penn., 1991) (would clash with strong right of privacy guaranteed in the Pennsylvania Constitution); Vermont, State v Oakes, 598 A.2d 119 (Vt., 1991) (Vermont is not persuaded

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[62]Thompson, above, n.4.

that the cost/benefit analysis of Leon is accurate); Idaho, State v. Guzman, 842 P.2d 660 (Id., 1992) ("we finally and unequivocally no longer adhere to a policy of sheepishly following in the footsteps of the U.S. Supreme Court in the area of state constitutional analysis." the good faith exception is ill conceived); New Mexico, State v. Gutierrez, 863 P.2d 1052 (N.M., 1993) (incompatible with the New Mexico Constitution).

Defendants argue that the reasoning of the states that have rejected the good faith exception for their own constitutions is compelling. Utah should not undermine the integrity of the judiciary, emasculate Article I, Section 14, encourage sloppy police work, or encourage lazy magisterial, trial, and appellate court review by adopting a good faith exception to the State's constitution.

POINT III

The evidence obtained must be suppressed because the Defendants' fundamental rights were violated

In State v. Rowe, 850 P.2d 427,429 (Utah 1993) (Rowe II) the Utah Supreme Court held that "suppression of evidence is an appropriate remedy for illegal police conduct only when that conduct implicates a fundamental violation of a Defendant's rights." In State v. Simmons, 866 P.2d 614 (Ut. App., 1993) the Utah Court of Appeals, citing to Rakas v. Illinois, 439 U.S. 128 (1978) held "[t]he proponent of a motion to suppress has the burden

of establishing that his [or her] own Fourth Amendment rights were violated by the challenged search."[63]

In this matter, if the evidence found in the garbage containers did not provide the issuing magistrate with a fair probability to conclude contraband was probably in Defendants' residence, or if this Court finds the warrantless search of the Defendants' garbage containers was unconstitutional under Article I, Section 14 of the Utah Constitution, the warrant was improperly issued. Because, as argued above, the warrant cannot be saved by the Leon "good faith" exception, or, alternatively, if this Court concludes that a Leon type "good faith" exception is not appropriate in an interpretation of the Utah Constitution, the search was illegal. Because the police did not have an alternative authority to enter the residence (as in Rowe II[64]), the search necessarily violated each Defendant's fundamental rights.

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[63]See also State v Ribe, 876 P.2d 403 (Ut. App., 1994).

[64]Rowe II, at 429-430.

CONCLUSIONS

The warrant in this case was improperly issued under both the Fourth Amendment to the Constitution of the United States and Article I, Section 14 of the Utah Constitution because the supporting affidavit did not provide the magistrate with a fair probability to conclude contraband was probably in the house where the officers were directed by the warrant. A good faith exception does not apply in these circumstances, either because the officer's actions fell under one of the four recognized exceptions to the exception of United States v. Leon or because there is no good faith exception to the Utah Constitution. Consequently all evidence derived as a direct or indirect[65] result of service of the warrant should be suppressed.

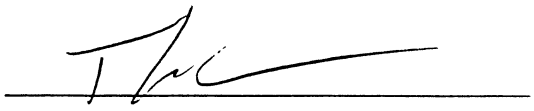
Dated this 21st day of August, 1996.

Thomas H. Means
Attorney for Defendants/
Appellants

[65]Wong Sun v United States, 371 U.S. 471 (1963).

MAILING/DELIVERY CERTIFICATE

I hereby certify that on the 22nd day of August, 1996, I personally delivered (or mailed by depositing in the U. S. Mail with postage pre-paid) the foregoing Amended Brief of Defendants-Appellants to Jan Graham, Utah Attorney General, Appellate Division, P.O. Box 140854, Salt Lake City, Utah, 84114.



ADDENDUM

Ruling on Defendants' Motion to Suppress
Affidavit in Support of and Request for Search Warrant

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. PATRICIA E. SMITH, RAQUEL NIELSEN, BRENT JACKSON, Defendants.	**RULING ON DEFENDANTS' MOTION TO SUPPRESS** CASE NO. 941400506 CASE NO. 941400507 CASE NO. 941400508 DATE: March 23, 1995 JUDGE: LYNN W. DAVIS

This matter came before the Court on Defendants' Motion to suppress. Oral arguments were heard on February 7, 1995. Defendants appeared and were represented by Thomas H. Means, with the State being represented by James R. Taylor, Deputy Utah County Attorney. The Court, after carefully considering the memoranda and oral arguments, now enters the following:

RULING

I.

FACTS AND PROCEDURE

On the eighth of June 1994, Sergeant Jerry Harper, of the Provo Police Department searched the trash receptacles, (two), of the Defendants' home after they had been placed in the street for collection. According to the information in the affidavit in support of the requested warrant, the officer identified no reason for the search of the trash cans. He did, however, mention two previous incidents which implicated the residents in drug involvement:

1) approximately 36 days prior to the search of the trash receptacles, one of the residents pled guilty to possession of marijuana and paraphernalia; 2) approximately 56 days prior to the search of the receptacles, two of the residents were involved in an incident where several men entered their home and held them captive while demanding money and drugs.

Sergeant Harper found within the receptacles some marijuana stems, seeds, Zig-Zag papers, and a small "piece" of marijuana. Also found was some personal correspondence with the names of two of the residents of the home in question. Based on the results of the search an affidavit was prepared and submitted to a magistrate. The Affidavit also mentioned the prior drug-related incidents. A warrant was issued for the home, and further evidence was found during the search of the home. Defendants were arrested and charged with possession of drugs and paraphernalia.

II.

ISSUES PRESENTED

(1) Is the affidavit submitted in support of the search warrant fatally flawed, and therefore, lacking a substantial basis for issuance of a warrant?

(2) Do Utah citizens have a reasonable expectation of privacy in trash placed in a city provided container and left at the edge of the city street for pickup?

III.

DISCUSSION

A. Sufficiency of the Affidavit.

Defendants argue that some of the information contained in the Affidavit in support of the warrant is irrelevant. This Court agrees. Several of the paragraphs in the Affidavit

include information which is spurious to the magistrate's determination of probable cause. However, such information does not invalidate the warrant. The burden placed upon the State in placing an affidavit before a magistrate is "a reasonable belief that the evidence sought is located at the place indicated by the policeman's affidavit." State v. Brooks, 849 P.2d 640, 643 (Utah App. 1993). Assuming, arguendo, that all the paragraphs mentioned by Defendants in their memorandum were determined to be irrelevant, and therefore, removed from consideration, State v. Potter, 860 P.2d 952 (Utah App. 1993), there is still sufficient information in the affidavit to establish probable cause. Under Illinois v. Gates, 462 U.S. 213 (1983), a "totality of the circumstances" analysis is proper and, even with the limited information left after removing the alleged irrelevant information, a magistrate could have a reasonable belief that the "evidence sought," (drugs), would be found "at the place indicated." Brooks, 849 P.2d at 643.

Defendants' argument that the evidence in the trash receptacles was 'stale' is unpersuasive. While it is conceivable that the trash could have been there for longer than a week, it is reasonable for the magistrate to conclude that the trash had been in the containers for a week or less. Thus a "common-sense reading of the affidavit" would suggest that drugs would probably be in the home. State v. Hansen, 732 P.2d 127, 131 (Utah 1987).

Defendants' argument that the prior bad acts were stale or improper may have some validity. Sergeant Harper does appear to justify his search of the trash receptacles by including references to prior involvement and alleged involvement with drugs. (See Affidavit paragraphs 2 & 3). While Defendants do not support their position with any case law or

statutory claim, it does strike the Court as improper to justify a search on the prior history of the individuals to be searched.

Other arguments made by the Defendants are neither persuasive nor supported by substantive law. The Court finds that the Affidavit is not fatally flawed and that a substantial basis existed in the Affidavit, under current law, for the magistrate to issue the warrant.

B. The Right of Privacy in Garbage under the Federal Constitution and the Utah Constitution.

The next issue to be resolved is whether Utah citizens have a protectable expectation of privacy in garbage placed in a city provided container and left at the edge of the street for pickup? This issue has two parts: 1) The protection of an expectation of privacy in garbage allowed by the provisions of the U.S. Constitution and federal case law; and 2) The protection of an expectation of privacy in garbage under the provisions of the Utah Constitution.

1. Protection under the Fourth Amendment of the Federal Constitution.

The controlling federal case is California v. Greenwood, 486 U.S. 35 (1988), which establishes the principle that a person has no reasonable expectation of privacy in trash placed outside the curtilage of the home. Id. at 37. The Supreme Court did not address whether searches of garbage left within the curtilage of the home were prohibited under the Fourth Amendment. Id. While the present case is similar to Greenwood, it can, contrary to the assertions of the State, be distinguished from Greenwood. In Greenwood, the police officer

had received information from an informant that illicit drugs had been shipped to the address in question, and acting on that information began a surveillance of the home. Based on suspicious activity at the address in the course of the surveillance, the officer searched the trash and found sufficient evidence to establish the probable cause necessary for issuance of a warrant. Id. at 37-38. In the instant case, much of what supported the actions of the police in the Greenwood case is lacking. However, in spite of these distinguishing facts the warrantless search of the garbage in the instant case did not violate the two prong test of Greenwood. Id. at 39.

In applying the first part of the Greenwood test the United States Supreme Court held that such warrantless searches "would violate the Fourth Amendment only if [defendants had] manifested a subjective expectation of privacy in their garbage . . ." Id. While no affidavits or other evidence were submitted with memoranda to show that defendants had such an expectation of privacy in their garbage, counsel at oral argument offered to have defendants testify to that fact. The Court declined such testimony as being unnecessary to reach a determination on the expectations of the defendants. For the purposes of this opinion, it will be accepted that the defendants had such an expectation of privacy; this, however, is not the end of the federal protection examination.

The second part of the Greenwood test must also be met before protection is warranted under the Fourth Amendment -- the expectation of privacy must be one that "society accepts as objectively reasonable." Id. The U.S. Supreme Court in Greenwood determined that such an expectation of privacy in garbage is not reasonable when the garbage is placed on the curb or alongside the street because it then becomes vulnerable to an unscrupulous person or

scavenging animal. Because a reasonable person would know that such garbage is available to curious members of the public, any expectation of privacy is unreasonable. A reasonable person cannot expect "police . . .to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." Id. at 41.

In the instant case, the Defendants left their garbage at the edge of the city street, outside of the curtilage of the home, for collection where it was available for the possible perusal of anyone who wished to take the time to do so. Therefore, there is no question that the second test under Greenwood has not been met. However, the U.S. Supreme Court also suggested that "States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." Id. at 43. The Court recognizes that while a state may not construe its own state constitution to infringe upon the rights set forth in the Federal Constitution, a state may provide for greater protection of its citizens' rights than that provided by the Federal Constitution. Therefore, this Court must yet consider whether the subject search was a violation of state guarantees embodied in the Utah State Constitution.

2. Protection under the Utah Constitution.

There are some additional facts, established from the presentation of evidence through proffer and by the Court taking judicial notice, which are pertinent to the state constitutional analysis. These facts are: 1) garbage containers in the city of Provo are owned and supplied by the city; 2) garbage collection occurs weekly and on a day certain; 3) collection is made by city employees in city owned trucks; 4) the garbage containers in question were owned by the city of Provo; 5) the garbage container in question was placed on city property,

ostensibly for collection purposes, and was outside the curtilage of the residence; 6) no local ordinance exists which prohibits any person from disturbing garbage placed on a public street for collection or in anyway restricting access to such garbage.

The final issue is whether there is a greater protection of one's expectation of privacy in garbage under the Utah Constitution. Specifically, does Utah society, under the state constitution, accept as objectively reasonable, an expectation of privacy in garbage?

Defendants argue that the history of Utah is unique and supports a societal expectation that individuals have a reasonable belief that their garbage would be free from governmental intrusion. The original pioneer settlers of the region suffered much at the hands of various state governments because of their religious beliefs and communal, ecclesiastically directed society. In three different states the government either ignored or condoned the persecution which was suffered by those who would eventually flee to, and settle the Utah basin. Even after this region was settled, the people, especially the society leaders, continued to suffer persecution at the hands of federal officials who often conducted searches and seizures of homes and effects without warrants in an attempt to enforce the anti-polygamy laws. (See Defendants' Memorandum pp. 24 - 25). Defendants, therefore, argue that such actions created distrust and suspicion of government on the part of the drafters of the Utah Constitution. This mistrust and suspicion would have motivated them to expect greater protection against such invasions of privacy from the provisions of the state constitution. Ironically, the wording of the appropriate provision, Article I, Section 14, of the Utah Constitution is nearly identical to the Fourth Amendment to the Federal Constitution, and therefore, at first glance would appear to hold the same level of protection as does the Federal Constitution.

Whether the Utah constitution supports an expectation of privacy in trash is unresolved in Utah. Other states have found that an expectation of privacy is reasonable under their state constitutions. While the determination of other sovereign states is not determinative of the question, the rationale and reasoning used by them may be helpful in considering the issue.

The Supreme Court of New Jersey found in State v. Hempele, 576 A.2d 793, (N.J. 1990), that under the relevant provision of that state Constitution, Article I, Section 7, an expectation of privacy need only be reasonable.[1] Id. at 802. The facts in Hempele, (which was a consolation of two cases), are similar to the facts in the instant case; the garbage was placed for collection near the street and then removed by police and searched. The New Jersey court appears to reach its conclusion based on concerns that "[c]lues to people's most private affairs can be found in their garbage. . . . A plethora of personal information can be culled from garbage: a single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it." Hempele 576 A.2d at 802-803. Further, local ordinances prohibited "any person to * * * disturb * * * garbage * * * placed on any curb, street or public place." Id. at 805, (citation omitted).

The Supreme Court of Indiana also found that an expectation of privacy in garbage is reasonable. Moran v. Indiana, 625 N.E. 1231 (Ind. 1993). The facts of the Indiana case are again similar to the instant case: garbage had been placed in plastic containers and set out for

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[1] The New Jersey Constitution reads "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized." N.J. Const. of 1947 art.I, para 7.

collection at the end of the residential driveway approximately a foot from the street. The containers held several opaque plastic bags which the police removed and searched. In Moran the court stated that "[u]nder Indiana law, warrantless searches are presumptively unreasonable, and the burden is placed on the state to show that the search falls within one of the recognized exceptions to the warrant requirement. The common thread underlying the recognized exceptions is the concept of 'exigent circumstances' which render the procurement of a warrant impractical or inadvisable because of a danger of harm to individuals or the potential destruction of evidence." Id. at 1239. The court went on to find that no exigent circumstances existed, and therefore, the search of the garbage violated the protection against unreasonable search and seizure found in Art. I, § 11 of the Indiana Constitution.[2]

In State v. Tanaka, 701 P.2d 1274 (Hawaii 1985), the Supreme Court of Hawaii found that an expectation of privacy existed in garbage. The facts of the Tanaka case, which entail three consolidated cases, are similar to the instant case but there is one important distinguishing characteristic--the garbage searched was located within the private property of the individual being charged. Thus, the police had to trespass onto the private property to gain access to the garbage searched. However, in at least one of the three consolidated cases the garbage was at the curbside of the defendants property. In the view of the Hawaii court, the Hawaii Constitution, article I, § 7 "recognizes an expectation of privacy beyond the

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[2] The Indiana Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Article I, § 11, Indiana Constitution.

parallel provisions in the Federal Bill of Rights." Id. at 1276. The Hawaii court went on to say:

> [p]eople reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. Business records, bills, correspondence, magazines, tax records, and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their activities, associations, and beliefs. It is exactly this type of overbroad governmental intrusion that article I, § 7 of the Hawaii Constitution was intended to prevent.[3]

Tanaka 701 P.2d at 1276, 1277.

The Hawaii court explained that an expectation of privacy did not preclude any searches by police of garbage but required that a warrant be obtained or that exigent circumstances be shown which would reasonably justify a warrantless search. Id.

The state of Washington also has found an expectation of privacy in garbage under the Washington State Constitution. In State v. Boland, 800 P.2d 1112 (Wash. 1990), Washington's highest court utilized criteria previously set down in State v. Gunwall, 720 P.2d

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[3] The text of article I, § 7 of the Hawaii Constitution reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Interestingly enough the Hawaii Constitution has an additional provision regarding the right of privacy. This is article I, § 6, which reads:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

808 (Wash 1986) 1) textual differences can provide a basis for a conclusion which would differ from that reached under the Federal Constitution, 2) differences in parallel provisions of the state and federal constitutions could dictate varying conclusions, 3) State common law history may reflect an intention to confer greater protection than the federal provisions; 4) Previously established state law may provide the basis to define the scope of a state constitutional right; 5) Differences in structure of the constitutions may require disparate results, (e.g the state may guarantee rights which are not protected on a federal level), 6) The matter may be of particular state or local interest Gunwall, 720 P 2d at 812, 813

The Washington Supreme Court rejected the federal analysis stating that "[w]hile a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion " Boland, 800 P.2d at 1117. Further, the Washington court using the criteria set forth in Gunwall found that a search of garbage was an intrusion into the private affairs and therefore a violation of the Washington Constitution, Art I, § 7.[4] Id at 1114-1116

Of the states which have found a greater protection of an expectation of privacy than the federal scheme allows, two have significant constitutional textual differences from the Fourth Amendment, both Hawaii and Washington have unique and explicit wording which lends itself to a broader reading of protection than found in the Fourth Amendment

Indiana and New Jersey, on the other hand, have state constitutional provisions which are nearly identical to the Fourth Amendment and the Utah provision In both the Indiana

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[4] The Washington Constitution provides at Art. I, § 7 that: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

and New Jersey cases, the facts were essentially the same as in the instant case, and the highest state court still found a heightened level of protection of an expectation of privacy in garbage.

However, while recognizing that some states have found a greater level of privacy protection in their state constitutions, this Court must also recognize that the majority of states have followed the federal analysis, and have not found independent grounds to provide for greater protection than that provided by the Fourth Amendment in this area.[5]

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[5] Hillman v. State, 834 P.2d 1271 (Colo. 1992) (defendant had no reasonable expectation of privacy in garbage bags left at curb for collection); Walls v. State, 536 So.2d 137, 138-39 (Ala. Crim. App. 1988), cert. denied, 490 U.S. 1020 (1989) (search of defendant's garbage located in front of his residence did not violate a proprietary interest in it, citing Greenwood); State v. Mooney, 588 A.2d 145, 157 n. 14, cert. denied, 502 U.S. 919, 112 S.Ct. 330 (Conn. 1991) (observed that trash bags, while closed containers, may not carry a reasonable expectation of privacy when placed beyond the curtilage of a home for collection); State v. Fisher, 591 So.2d 1049, 1050 (Fla. Dist. Ct. App. 1991) (concluded that defendants sufficiently exposed their garbage to the public to defeat Fourth Amendment protection when placing it in plastic cans located in front of the house on the road right-of-way); Perkins v. State, 398 S.E.2d 702, 704 (Ga. App. 1990) (followed Greenwood); People v. Collins, 478 N.E.2d 267, 278-79, cert. denied, 474 U.S. 935 (Ill. 1985) (found no reasonable expectation of privacy in a garbage bag left on a second floor landing of an outside stairway because such area was an openly accessible common area of the apartment building); State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988) (found no violation of the Iowa Constitution where evidence was seized from trash bags that were tied shut and placed in metal garbage cans); In re Forfeiture of U.S. Currency, 450 N.W.2d 93, 94 (Mich. App. 1989) (followed Greenwood); State v. Krech, 403 N.W.2d 634, 637-38 (Minn. 1987) (concluded that defendants did not have a reasonable expectation of privacy in garbage wrapped in plastic bags and placed in cans in back of a duplex a few feet away from an alley where defendant's customers typically walked near the garbage in route to the back entrance); State v. Texel, 433 N.W.2d 541, 543 (Neb. 1989) (held that no reasonable expectation of privacy exists in garbage which has been made accessible to the public); Commonwealth v. Perdue, 564 A.2d 489, 493 (Pa. Super. 1989), appeal denied, 574 A.2d 68 (1990) (found no

In the states which found a level of privacy protection greater than the federal scheme, the reasoning appears to center on a philosophical argument--that unless restraints are placed on the police powers of government, those who exercise those powers will abuse it. There is no question that the general public would be incensed if the police began to randomly pick up garbage placed in front of residences' looking for evidence of wrongdoing. Even those citizens who are model citizens would likely become paranoid about their lives and examine each item discarded, looking for anything which could or might lead to possible arrest or even public embarrassment. Such arguments have a certain attractiveness in that they are easily reconciled with the underlying rationale of the protection inherent in the Bill of Rights. However, philosophical arguments are often stretched too far. The mere parading of a list of horribles does not make them a reality. The reality of budgetary and personnel constraints placed upon police make such actions unlikely. In the various cases examined by this Court the police have not randomly selected an individual's garbage, but have had a reasonable suspicion that illegal activity was taking place within the house from which the garbage came.

Reaching a balance between the two conflicting ideas of personal liberty and communal safety requires a constant shifting of resources and authority because societal values change. Not long ago, each home would burn its own garbage and spread the ashes to the wind--today society does not accept such practices as beneficial to the community. Society has developed different technology to handle the garbage produced in day-to-day

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reasonable expectation of privacy in garbage left for collection subject to public inspection); State v. Stevens, 367 N.W.2d 788, 797, cert. denied, 474 U.S. 852 (Wis. 1985) (found that, as trash moves farther from the home, any expectation of privacy in it is diminished).

living. These technology changes have influenced the way we, as a society, view personal liberty. Any determination of the expectations of society must be weighed against the norms of today, as influenced by the past, but not by the values and standards of the past.

In our highly mobile society it would be difficult for someone to remember which states accept an expectation of privacy in garbage and which do not. A uniform standard has great appeal because of the certainty and stability which it engenders. However, uniformity benefits ~~to~~ are not, standing alone, sufficient to determine whether Utah society accepts the federal scheme of privacy protection in garbage.

The Utah Supreme Court has not addressed expectation of privacy in garbage directly. The Utah Supreme Court has, however, on at least one occasion interpreted the provisions of the Utah Constitution in a manner which may be read to expand the civil liberties of the citizens of Utah beyond the federal threshold. See State v. Thompson, 810 P.2d 415 (Utah 1991), (recognized an expectation of privacy in bank records under state constitution where the federal constitution does not). The facts of Thompson are sufficiently different from the instant case to distinguish it from the instant case and for Thompson to be insufficient to support a greater expectation of privacy in garbage under the Utah Constitution than the Federal Constitution.

It seems to this Court that any decision which announces a heightened expectation of privacy in garbage, under a state constitutional analysis, must fairly, reasonably, and clearly articulate the reasons. Any such decision should not simply be an attempt to viscerally sidestep Greenwood. The minority arguments in Greenwood are compelling and persuasive, in the estimation of this Court, but they have failed in every jurisdiction in this country which

has considered the issue under a Fourth Amendment analysis, and prevailed in only two jurisdictions, Indiana and New Jersey, under a state constitutional analysis where the facts are anywhere similar to this case.

Regardless of how persuaded this Court is by the minority view in Greenwood, this Court cannot reasonably find anything in Utah's unique constitutional history which would dictate a result different from Greenwood. A recitation of Utah Mormon pioneer polygamous battles with federal agents is interesting, but far from relevant and convincing on the very narrow issue before this Court. A mere substitution of a result this Court favors, without setting forth concrete, objective, substantive, and articulable considerations, is judicially disingenuous, and therefore, would simply subordinate the Fourth Amendment result to this Court's personal predilections. Certainly that is no way to adopt a body of state constitutional law which would give any guidance and direction. The Court suggests that major departures from soundly established Fourth Amendment jurisprudence should be announced by Utah's appellate courts, not by trial court judges.

Lastly, even if this Court were to find a heightened expectation of privacy in garbage under a state constitutional analysis, this Court, similar to Moran v. Indiana, 625 N.E. 2d 1231,1240, would sustain the subject search. In Moran the Indiana Supreme Court applied a good faith exception to the exclusionary rule to evidence obtained during a warrantless search of garbage put out for disposal, even though the Court later found the search violated its state constitution. Id. Here, as there, no state court precedent addressed the constitutionality of searches of garbage. The Indiana court held that it was reasonable for the police to conclude that the defendants lacked a privacy interest in the garbage.

Because the Utah Supreme Court has not directly addressed the issue of an expectation of privacy in garbage, and no support is found in state lower court rulings to support a result different from the federal model, the federal threshold must prevail. This Court, while acknowledging the compelling arguments on both sides of the issue, therefore, determines that no reasonable expectation of privacy exists as to the trash placed by Defendants in containers owned and provided by the city, and left in the street for collection by city employees. Neither, the Fourth Amendment, nor Article I, Section 14 of the Utah State Constitution is implicated and, therefore, no warrant was necessary to conduct the search.

IV.

DECISION

(1) The probable cause Affidavit, filed in support of the search warrant, while arguably containing spurious information, is not fatally flawed and a magistrate could reasonably believe that the evidence sought would be found in the home. Accordingly, the motion to quash the warrant is denied.

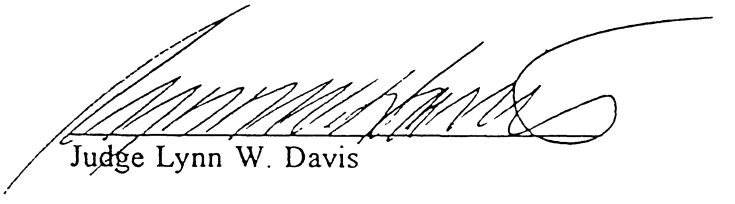
(2) The search of trash, placed in a city owned receptacle, left on the city street, with the anticipation that it would be picked up by city employees, is not a violation of Defendants'

Fourth Amendment rights nor in violation of Article I, Section 14 of the Utah Constitution.

THEREFORE, Defendants' Motion to Suppress is denied.

Dated at Provo, Utah, this 23 day of March, 1995.

BY THE COURT



Judge Lynn W. Davis

cc: Thomas H. Means, Esq.
James R. Taylor, Esq.

T. Means

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IN THE FOURTH CIRCUIT COURT, STATE OF UTAH
COUNTY OF UTAH, AMERICAN FORK DEPARTMENT

- -

STATE OF UTAH, EX PARTE,	:	
		AFFIDAVIT IN SUPPORT
IN THE MATTER OF:	:	OF AND REQUEST FOR
		SEARCH WARRANT
A NARCOTICS INVESTIGATION	:	

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Comes now Jerry Harper, having been duly sworn, who deposes and states as follows:

1. I am a sergeant with the Provo Police Department. I have been a peace officer since 1979 when I graduated from POST as the officer with the highest academic achievement in my class. During the time I have been a peace officer I have received over 225 hours of specialized training for law enforcement work including 185 hours of training specific to narcotics work. Narcotics classes include training in surveillance, operation of surveillance and electronic investigatory equipment, field testing of drugs and drug recognition. As an officer I have participated in hundreds of operations involving the undercover purchase of narcotics and/or the arrest of persons for substance abuse related violations. I have experience working undercover providing first hand experience with narcotics trafficking. I have supervised narcotics investigations for the Provo Police Department since 1992. I am currently designated as the department trainer/specialist in the areas of fingerprinting, surveillance, video equipment, narcotics and drug recognition.

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2. On April 13, 1994, several unidentified men entered the home of Pat Smith and Brent Jackson at 770 South 1033 West in Provo at 7:15 a.m. without permission. According to Smith and Jackson the men held them captive for several hours demanding drugs and money. The men wanted to know where the drugs were.

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3. On May 3, 1994, Pat Smith plead guilty to possession of marijuana and possession of drug paraphernalia in the Fourth Circuit Court. The crimes were alleged to have occurred January 15, 1993 at the home of Linda Cannon in Orem.

4. Provo City has a solid waste collection system. Each home

T. Means

is assigned a specific can which is owned by the city. An additional can may be obtained for an additional fee. Once per week the cans are to be placed at curbside or in the street for collection. A city truck then mechanically picks up and empties the cans.

5. On June 8, in the early morning hours, I went to the home of Pat Smith at 770 South 1033 West in Provo. There were two cans with the number "1033" stenciled in white paint on the side in the street in front of the house. I took the cans to the Police Department where I reviewed the contents. After I had finished I replaced the garbage in the cans and returned them to the street in front of the house.

6. Within the cans I found marijuana stems, seeds, a marijuana cigarette along with zig-zag papers and a small piece of marijuana. I tested the small piece with a chemical reagent test which indicated positive for marijuana.

7. I also found correspondence with the address of 770 South 1033 West, Provo and the names of Pat Smith and Brent Jackson. The correspondence included a utility bill to Brent Jackson for natural gas. A phone bill for Brent and Pat Jackson was also located.

8. The amounts of stems, seeds and marijuana in the garbage imply possession of small amounts for use. Such amounts of marijuana are typically packaged in bags of 1/8 ounce or less, quite small in volume. Such bags can quickly and easily be hidden in clothing or destroyed if notice is given of intent to search.

9. Marijuana and paraphernalia are often kept in outbuildings and vehicles. Failure to search the curtilage of the residence together with the person of individuals present and vehicles located on the curtilage will likely result in officer's missing important evidence.

10. It is my experience that most of the people I have encountered in connection with the unlawful use of marijuana also occasionally sell, sometimes paying for their use with profit from sales. It is so common as to be the rule rather than the exception, to find evidence related to production and/or distribution whenever marijuana is located in a residence.

11. The residence is more particularly described as a two story duplex with tan brick and brown wood on the front. On the side the brick extends to the eaves. There is a carport on either side. The roof is gravel. The duplex is on the south side of 770 South and faces north. "1033" is the west residence with the number "1033" mounted to the right of the door as you face the door.

12. I expect to locate additional controlled substances in the residence together with associated paraphernalia including items used or capable of use for the storage, use, production, or

distribution of marijuana.

WHEREFORE, your affiant requests that a warrant be issued by this Court authorizing a search of the residence together with the curtilage and the person of all vehicles and individuals present within the home and curtilage at the time of the search for the presence of controlled substances together with associated paraphernalia including items used or capable of use for the storage, use, production, or distribution of marijuana to be executed without notice of intent or authority in the daytime.

Dated this 8th day of June, 1994, A.m.

Affiant

Subscribed to and sworn before me this 8th day of June, 1994, A.m.

Magistrate

Discovery Sent To Defense Attorney

JUL 0 6 1994

PLEASE GIVE COUNTY ATTORNEY TO T. Means